Chapter 8

Constitutional and Legal Issues in Drug Courts

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I. [§8.1] INTRODUCTION

The legal and constitutional issues arising in drug courts are pervasive and complex: from First Amendment Establishment Clause prohibitions, to the scientific reliability of drug-testing results, and to the due process rights of drug court participants in termination proceedings and during the sanctioning process.

This chapter does not attempt to collect and analyze all the relevant law from each drug court jurisdiction. By highlighting significant issues, the author gives a starting point from which to begin the research applicable to that court. Additionally, the author is advocating certain best legal practices for operational drug courts. While all these practices may not be required in a particular jurisdiction, they reflect a standard of practice that merges the therapeutic benefits of drug court procedure and the highest legal standard of due process.

II. [§8.2] FIRST AMENDMENT

As an adjunct to treatment, drug courts frequently refer drug court participants to 12-step programs such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA). The treatment provider or the court expect the participant to "work" or complete the 12-steps of the program. While these 12-step programs declare a tolerance for each person's personal vision of God, the writings of AA and NA encourage the participant to commit to the existence of a Supreme Being.[1]

Citing the Establishment Clause[2] of the First Amendment to the Constitution, courts have consistently held that requiring an individual to participate in an AA or NA program is unconstitutional.[3] Ironically, courts have not accorded evidentiary privilege protection to communications by attendees in such programs.[4]

Although court-mandated participation in AA and NA may run afoul of the First Amendment, such referrals are not prohibited where there are alternatives available. The Establishment Clause is violated when the state coerces the participant to engage in a religious activity.[5] Where there are other 12-step or secular self-help groups to which the drug court participant can readily be referred, use of AA or NA groups is constitutional for those individuals who do not object.[6] For offenders who do object to the deity-based 12-step programs, placement in a secular program is appropriate.[7]

Ordering AA or NA without secular alternatives violates the First Amendment.

Thus, where 12-step referrals are used, the author recommends that the drug court judge should ensure that the team surveys the community for the availability of secular 12-step or other self-help programs and provides the drug court participant a secular alternative when requested.[8]

Drug court practices also implicate the First Amendment Freedom of Speech and Association Clause.[9] As a condition of program enrollment, judges often prohibit drug court participants from being in certain geographic locales (area restrictions) or associating with certain individuals (association restrictions). Area restrictions have survived constitutional attack when they are narrowly drawn.[10] The factors often used in determining whether the restriction is reasonable include whether the defendant has a compelling need to go through or to the area, a mechanism for supervised entry into the area, the geographic size of the restricted area, and the relationship between the restriction and the rehabilitation needs of the offender.[11]

To be Constitutional, area and association restrictions must be narrowly drawn and reasonably related to the rehabilitation needs of the participants.

Similarly, the courts have routinely upheld association restrictions as a condition of supervision. Constitutional attacks on such provisions are unavailing when the conditions are reasonably related to the purposes of probation, the prevention of crime, and protection of the public.[12]

III. [§8.3] FOURTH AMENDMENT AND RELATED ISSUES

Under the Fourth Amendment, individuals cannot be arrested nor have their person and property searched without probable cause. Drug court participation is often contingent upon a defendant's agreement to execute a search waiver, by which the participant consents to a physical and property search, often without cause, day or night.

However, searches of probationers without a warrant are upheld based upon reasonable suspicion,[13] and because of the distinctions between jurisdictions, including state and federal differences, every judge and team must be aware of the terms of the waiver. Probable cause is not required because probation is a form of criminal sanction which subjects the probationer to reasonable restraints on liberty and the states' need to control the risk for recidivism that probationers present.[14] The U.S. Supreme Court recently upheld a search solely based upon a parolee's execution of a search waiver.[15] Previously, several states have found that a search waiver alone justifies a suspicionless, warrantless search—at least as it relates to cases where the offender's status is as a probationer or parolee.[16] The constitutionality of a search solely based upon a search waiver for offenders on bond or other nonconvicted status is in doubt.[17]

The validity of search conditions may depend on the status of the participant—on probation, preadjudication, or on bond.

This same distinction arises when mandating random drug testing as a condition of probation or parole,[18] contrasted with orders requiring drug testing as a condition of

pretrial release.[19] A condition of bond or pretrial release which requires drug testing implicates the Fourth Amendment and must be reasonable, based upon an individualized assessment that a person may use drugs during pretrial release.[20] The individualized suspicion can be based upon drug convictions or self-reported drug use.[21]

Related to the drug-testing issue as a condition of release or sentence is a court order prohibiting the drug court participant from consuming a legal substance—alcohol. Where the defendant has been convicted, the alcohol abstinence condition must be reasonably related to the defendant's reformation or protection of the public.[22] As noted in one case:[23]

> Presumably for this very reason, the vast majority of drug treatment programs, including the one Beal [the appellant] participates in as a condition of her probation, require abstinence from alcohol use (Am. U. Sch. Pub. Affairs, 1997 Drug Court Survey Report: Executive Summary, p. 49). Based on the relationship between alcohol and drug use, we conclude that substance abuse is reasonably related to the underlying crime and that alcohol use may lead to future criminality where the defendant has a history of substance abuse and is convicted of a drug-related offense.

In the pretrial release context, alcohol prohibition clauses have been held to be valid as long as reasonably related to assuring the defendant's future appearance in court.[24]

IV. [§8.4] DUE PROCESS

"[Nor] shall any state deprive any person of life, liberty, or property without due process of law."

~ U.S. Constitution[25]

Because drug courts utilize nonconfrontational, often streamlined procedures, the danger exists that drug court offenders will not be fully accorded their due process rights. In fact, commentators have cited the nonadversarial nature of drug courts as promoting a tension with participants' due process rights.[26] Despite certain informalities, and cooperation between counsel, drug courts must adhere to Key Component 2 of the Ten Key Components (included on page of this 217 benchbook):

> Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.[27]

Procedural protections are due under the Due Process Clause when the defendant will potentially suffer impairment to a recognized liberty or property right under the Fourteenth Amendment.[28] If due process applies, the question remains, what process is due?[29] Due process is flexible and requires the procedural protections that the situation demands.[30] Procedural due process obligations in drug court are usually identified with revocation of probation, termination from drug court, and the imposition of sanctions, which often involve an individual's liberty rights.[31]

Termination from drug court can involve the enforcement of preenrollment agreements by which the participant consents to a court trial based solely upon the police complaint. If the consent is knowingly, voluntarily, and intelligently given, the stipulated fact trial does not violate due process.[32] However, a stipulation to a trial based solely upon the police report does not relieve the prosecution from its obligation to prove the charge beyond a reasonable doubt before the accused can be found guilty.[33] The same standards of a knowing intelligent waiver are applicable to a drug court participant foregoing, as part of a plea agreement, the right to appeal,[34] the right to contest a search,[35] or even the right to forgo incarceration credit when jail is a sanction and program participation is revoked and a prison sentence is imposed.[36] The obligation of all counsel and judges to educate themselves about drug courts, so as to properly advise clients, was addressed by Judge May in *Smith v. State*:[37]

The court can and should prohibit drinking alcohol while in the program.

> Drug courts have been in existence since 1989, originating from the creativity, hard work, and ingenuity of Chief Judge Gerald T. Wetherington and Judge Herbert M. Klein. Since then the concept has spread throughout this country and the world. There are currently drug courts in forty-eight of our fifty states, and in England, Canada, Australia, South America, Bermuda, and the Caribbean. There are currently seventy-four drug courts (thirty-eight adult, twenty-two juvenile, twelve dependency, and two reentry) in the State of Florida. It is essential that lawyers educate themselves as to the availability, requirements, and appropriateness of drug court programs. Only then can they effectively advise their clients. It is equally important for the institutions that educate future lawyers, as well as those that educate the other disciplines that play vital roles in the drug court process to incorporate drug courts into their curricula. For lawyers to do otherwise is for them to become legal dinosaurs. To ignore the need to learn about the drug court process is to ignore the evolution of the justice system. The sooner the Bar educates itself, the sooner the issue raised in this case will become extinct.

Usually, terminations from drug court require notice, a hearing, and a fair procedure.[38] However, a participant who self-terminates from drug court is not entitled to a pretermination hearing.[39] Many drug court participants are not on formal probation, but are on a diversion, deferred prosecution, deferred judgment, or deferred sentencing status. The consequences of termination from drug court are comparable to those sustained in a probation revocation. Consistent with several state rulings on this issue, the author concludes that the best practice is to accord drug court participants the same due process rights enjoyed by probationers.[40] In *Gagnon v. Scarpelli*, the U.S. Supreme Court required a probationer be accorded a preliminary and final revocation hearing.[41] Before the preliminary hearing, the probationer must be notified of the hearing, its purpose and the alleged violation, the limited right to confront and call witnesses, and the probationer's right to be present, as well as given a written report of the hearing.[42] At

the probation revocation hearing, similar elements are required including (1) written notice of the violation;[43] (2) disclosure of the evidence against the probationer; (3) an opportunity to be present and testify; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral magistrate; and (6) a written finding of the evidence relied upon and the reasons for revocation. [44] Jurisdictions are divided on whether the drug court defendant can waive some or all of these rights, in advance, by signing a contract.[45] In *Staley v. State*, a panel of the Florida Court of Appeals held that a drug court participant, upon entry to the drug court, could not contractually waive the substantive due process rights attendant to a revocation hearing.[46]

The law in this area is very much in a state of flux. Recent decisions from the state of Idaho are a good example. In *State v. Rogers*,[47] the Idaho Court of Appeals held that the terms of the drug court contract governed the process by which termination would occur. Holding that the full panoply of due process rights present in a probation revocation hearing were not required in a drug court revocation proceeding, if the limitation was voluntarily agreed to by the defendant, the Idaho appellate court recommended the trial court nonetheless grant the drug court participant the same rights accorded a defendant facing revocation of probation.[48] In October 2007, the Idaho Supreme Court reversed, holding that protections akin to those given a probationer should be accorded a drug court defendant who has pled guilty but is on deferred sentence diversionary status.[49] Recognizing that the procedures in drug courts may differ, the Idaho Supreme Court held that different due process safeguards may be appropriate for other jurisdictions:

Best practice is to apply probation revocation standards of due process for drug court terminations.

> As a preliminary matter, a short discussion of Idaho's drug court program is warranted. The introduction of the problem-solving approach in the courts has given rise to innovative diversion efforts such as drug court programs. In 2001, the Idaho legislature enacted the Idaho Drug Court Act, by 2005 amendment now known as the Idaho Drug Court and Mental Health Court Act (the "Act"). I.C. §§ 19-5601, *et seq.* The Act provides, *inter alia,* that the district court in each Idaho county may establish a drug court. I.C. § 19-5603. With the exception of eligibility standards, *see* I.C. § 19-5604, the Act itself provides no guidance on the inner workings or procedures to be followed by a drug court. Instead, the Act authorized the Idaho Supreme Court to establish a Drug Court and Mental Health Court Coordinating Committee and vested it with responsibility for establishing standards and guidelines and providing ongoing oversight of the operation of drug courts. I.C. § 19-5606. Effective September 26, 2003, the Committee has adopted guidelines for adult drug courts. *See* Idaho Adult Drug Court Guidelines for Effectiveness and Evaluation. These guidelines do not specify exactly how a drug court program must be run and, as specifically stated therein, the guidelines "are not rules of procedure and have no effect of law." In addition, effective August 15, 2005, the Idaho

> Supreme Court adopted an administrative rule to provide additional direction for the development, establishment, operations, and termination of drug courts and mental health courts. *See* Idaho Court Administrative Rule 55. As relevant to the instant appeal, the rule addresses primarily how a drug court is created and it does not mandate that a drug court program must be operated in any particular way.
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> As of January 2006, Idaho had forty-four drug courts in operation spread out over approximately twenty-three counties and at differing levels of the judicial system within some counties. From the above discussion, it must be assumed that each drug court in Idaho operates uniquely and, therefore, the analysis in this case might not be applicable to any other particular drug court program in the state.[50]

The recent case, *People v. Kimmel,*[51] held that in a mental health/drug court, the defendant was not entitled to a hearing per se, but was entitled to make a statement and have counsel present arguments on why the defendant should not be removed from the program where he failed to appear for over eight months. Contrary to *Kimmel* are recent decisions from Indiana and Virginia appellate courts, holding that drug court participants are entitled to hearings because drug court termination affect liberty interests and therefore the Due Process Clause.[52] The author recommends that the termination process from drug court include the full panoply of rights accorded a probationer facing a revocation of probation petition. Of course, assuming there are no jurisdictional, statutory, or ethical barriers, there is no reason that the termination and revocation hearings cannot be combined.

Specimen testing must meet evidentiary standards.

Conspicuously absent from federal due process requirements is the right to counsel at probation preliminary and revocation hearings. Although the federal constitution does not mandate the right to counsel at probation preliminary and revocation hearings,[53] many states accord probationers facing revocation such a right.[54] The author endorses the right to counsel for drug court participants facing revocation or program termination, where the underlying crime is a felony or where the potential penalty may include a jail sentence.[55]

At the probation revocation hearing, the full constitutional procedural protections do not apply.[56] There is no jury trial right[57] and double jeopardy does not apply[58] to a revocation hearing. In certain circumstances, the probationer cannot attack the underlying conviction or guilty plea.[59] In most jurisdictions, the Fourth Amendment does not apply to probation revocation proceedings,[60] and the Fifth Amendment[61] and *Miranda*[62] are not fully applicable to probation revocation proceedings. Additionally, revocation allegations usually need not be proven beyond a reasonable doubt.[63] Finally, the rules of evidence do not apply at a probation hearing and hearsay is admissible.[64]

Despite the lessened procedural requirements for termination from drug court or probation revocation hearings, due process requires that these proceedings be conducted according to the Fourteenth Amendment's concept of fundamental fairness.[65] For

example, in an opinion involving a drug court, a five-part test was adopted to determine whether the evidence supporting termination from a treatment program was sufficiently reliable to meet due process requirements.[66] The factors the court considered included the following:

- Whether a hearsay report by the treatment provider was corroborated
- The reliability of the source of the information and, if provided by unnamed informants, the reason for identity nondisclosure
- The provision of a hearing with opportunity to fully cross-examine adverse witnesses
- Whether a preponderance of the evidence supported termination
- The disparity of the sentence upon completion and noncompletion

Issues of reliability are not just centered on the admission of hearsay evidence at termination/revocation proceedings. Frequently, termination/revocation is based upon the results of drug testing.

V. [§8.5] DRUG TESTING AND DUE PROCESS

The reliability of drug test results under the Federal Rules of Evidence (FRE) is dependent upon the witness being qualified to opine about the matter at issue and whether the scientific testing meets the standards of *Daubert v. Merrell Dow Pharmaceuticals*.[67] While some states have adopted *Daubert*, others rely upon Daubert's predecessor *Frye v. United States*.[68] Some other states use an analysis based upon FRE 702,[69] or they have devised their own formulation.[70]

The purpose of this section is not to be an exhaustive dissertation on the reliability of drug-testing techniques, but rather to highlight some of the reliability issues and their potential impact on due process. The most common modalities of drug detection in drug court include testing samples from urine, hair, and sweat.[71]

Urine drug-detecting testing is usually done by instrumented testing or nonlaboratory, on-site testing or a combination of both. One common methodology for urine testing is the enzyme multiple immunoassay technique (EMIT). The EMIT test does not measure the amount of drugs in the urine but instead measures the reaction of an enzyme to a particular drug.[72] EMIT results have been found to be reliable when confirmed with a second EMIT test.[73] Contentions that the EMIT results must be confirmed with an independent method of drug testing before the results meet due process reliability standards have been rejected.[74] As noted in Chapter 6, "The Fundamentals of Drug Testing," this is not a best practice since whatever cross-reaction may be occurring will not be resolved by a second test using the same analysis method. Other urine testing such as the fluorescein polarization immunoassay test (FPIA) and thin layer chromatography have been found to be reliable, at least where the proponent has established the necessary foundation.[75]

If they deny use, participants may be charged the cost for confirmed tests.

To conserve costs and obtain rapid results, many drug courts rely upon noninstrumented on-site test cups or dip sticks. The reliability of such testing instruments has been the source of considerable debate,[76] particularly in the area of methamphetamine.[77] If on-site, noninstrumented testing is used and the drug court participant denies such use, the author recommends the urine specimen should be retested by instrumented testing, preferably by gas chromatography/mass spectrometry (GC-MS).[78] If the retest returns another positive result, the drug court participant may be assessed the retest cost[79] and sanctioned for lack of candor.[80] A word of caution: drug courts must be aware of the cutoff levels of both the on-site test and the instrumented test, since differing results could be attributed to different cutoff levels. As noted in Chapter 6, in almost all cases the cutoff levels used in confirmation will be lower than those of the presumptive or noninstrumented tests. This will help to avoid misinterpretations.

Some drug courts are employing the sweat patch to determine drug usage. The patch is composed of an absorbent pad with an outer membrane which is placed on the wearer's back or forearm. The patch is designed to collect the wearer's sweat and any drug or drug metabolite over the period that patch is attached—approximately one week.[81] Although generally held to be reliable, there is evidence that the patch can test positive from contamination or exposure to drugs not ingested by the wearer.[82]

Hair is also analyzed to determine drug usage. The obvious problem with hair testing for drug usage is the high potential for environmental contamination, and the reliability of the methodology used to determine the presence of drugs or drug metabolites in the hair specimen.[83]

Another test finding favor in drug courts is a test for Ethyl Glucuronide (EtG), which is a metabolite of alcohol. The presence of EtG in urine reportedly provides proof of prior alcohol consumption, even after the alcohol itself has been eliminated from the body.[84] EtG results have been questioned, and using a cut-off level that is sufficiently high is critical because of the real possibility of incidental or environmental exposure to alcohol.[85]

As a preface to establishing the general reliability of the testing methodology to meet due process guarantees, the proponent must connect the specimen collected and tested to the person against whom it is offered.[86] Although hearsay is admissible at the revocation/termination/disciplinary hearing, due process requires that the proffered hearsay evidence have sufficient indicia of reliability before it can be relied upon to discipline.[87]

VI. [§8.6] JUDICIAL IMPARTIALITY AND DUE PROCESS[88]

Due process requires that a judge possess neither actual nor apparent bias[89] in favor of or against a party. The standard for determining the appearance of bias or partiality is an objective one.[90] Usually the basis of recusal is due to partiality or bias acquired outside the context of the proceedings—or from an "extrajudicial source."[91]

Additionally, a judge should recuse where the court has personal knowledge of disputed facts.[92]

Judges sitting in drug court often have substantial information about drug court participants—some of which was gained through on-the-record colloquies and pleadings, as well as informal staffings with defense counsel, the prosecutor, the treatment provider, and probation. The Oklahoma Supreme Court[93] recognized the potential for accusations of bias against a drug court judge for information obtained in the court's supervisory role and recommended an alternate judge handle termination proceedings:

> However, we recognize the potential for bias to exist in a situation where a judge, assigned as part of the drug court team, is then presented with an application to revoke a participant from drug court. Requiring the district court to act as drug court team member, evaluator, monitor, and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a drug court participant's program.
>
> Therefore, in the future, if an application to terminate a drug court participant is filed and the defendant objects to the drug court team judge hearing the matter by filing a motion to recuse, the defendant's application for recusal should be granted and the motion to remove the defendant from the drug court program should be assigned to another judge for resolution.

Recent decisions have held that a drug court judge does not violate the defendant's due process rights by presiding over the termination or the revocation hearing.[94] Although not necessarily required, the author recommends that the drug court judge give the defendant the opportunity to recuse the judge, and the drug court judge should not be the judge conducting termination or probation revocation hearings, unless the participant and defense counsel specifically consent in writing to the judge hearing such matters.[95]

Due process and judicial impartiality concepts may require a different judge hear termination matters.

VII. [§8.7] DRUG COURT SANCTIONS AND DUE PROCESS

Closely related to the issue of termination/revocation is the use of jail as a sanction for program noncompliance. Does due process mandate all the procedural requirements contained in a revocation/termination hearing, even where the defendant has consented to the imposition of such sanctions as a condition to drug court participation? A person facing a probation revocation or drug court termination proceeding[96] is constitutionally entitled to an array of due process rights, including a hearing.[97] Similarly, a prison inmate

must be accorded certain due process rights, including a hearing, if the disciplinary proceeding could jeopardize good or earned time credits.[98] It seems incongruous indeed, for a drug court participant to not be entitled to a hearing where jail is a possible sanction[99] but a prisoner or parolee would be so entitled. At least one court has held that the drug court participant cannot, in advance, waive the right to be accorded the due process rights associated with a revocation hearing.[100] It is the position of the author that the best practice would dictate that, when the drug court participant contends that he or she did not engage in the conduct that is subject to a jail sanction, the court should give the participant a hearing with notice of the allegations, the right to be represented by counsel, the right to testify, the right to cross-examine witnesses, and the right to call his or her own witnesses.[101] The author believes that the hearing should be expedited (within two days), consistent with the participant's need to prepare for the hearing.[102]

Participants are entitled to a hearing where jail is a possible sanction.

Nondrug court participants have attacked, as a violation of due process, the assessment of drug court or mental health court fees, which are used to support these programs.[103] In denying the relief requested, the court characterized the assessments as fines not fees and found that the fines were not grossly excessive and were rationally related to the crime for which the defendant was sentenced—drug possession.[104]

VIII. [§8.8] EQUAL PROTECTION

"[N]or [shall any state] deny any person within its jurisdiction the equal protection of the laws."

~ U.S. Constitution[105]

Constitutional attacks on drug courts based upon equal protection grounds are usually based upon admittance or refusal to admit a defendant into the drug court program. The Fourteenth Amendment Equal Protection Clause guarantees that persons similarly situated with respect to a legitimate purpose of the law will receive like treatment. Three tests are used to determine whether a classification violates equal protection. When the legislation or governmental act involves a fundamental right or creates a suspect class, the strict scrutiny test is used.[106] An intermediate level of scrutiny is used when the classification impacts a liberty right and a semi-suspect class exists.[107] Under the third test, the classification must simply have a rational relationship to a legitimate governmental objective.[108]

The admission or exclusion of a defendant from a drug court program is analyzed under the rational basis equal protection test.[109] In *State v. Harner*,[110] the defendant complained that the absence of a drug court, where he was charged, violated his equal protection rights when such courts were available in adjacent counties. The Washington Supreme Court

held that because each county needed to tailor its programs to meet fiscal resources and community obligations, the decision not to fund a drug court was rationally related to a legitimate governmental purpose.[111] Other jurisdictions have followed the *Harner* rationale and have also held that the defendant is not entitled to a hearing before being rejected for drug court.[112]

Best practice requires a hearing where the facts upon which a sanction may be based are disputed.

In the recent case of *Evans v. State*,[113] a defendant, who was HIV positive, argued that his exclusion from drug court violated equal protection and the Americans with Disabilities' Act (ADA). The appellate court rejected his contention stating that it was not his HIV status that excluded him from drug court, but his complicated medical requirements, including the need for multiple medications which the program was ill equipped to handle. Such a justification presented a rational basis for rejection of Evans. Because Evans failed to demonstrate that his disabilities (HIV and mental illness) affected major life activities, he did not qualify for protection under the ADA.

Defendants have similarly argued that when a drug court is available in the local jurisdiction, it is a denial of equal protection to not make it available to all defendants. Appellate decisions have rejected such assertions because there is no right to enter drug court.[114] Similarly, constitutional attacks based upon a State's Privileges and Immunities Clause have been rejected.[115]

There is no constitutional right to enter the drug court.

Drug court participants have also averred that placing them in a drug court program constitutes a violation of equal protection. Applying the rational basis test, the New Mexico Court of Appeals held that juveniles could not reject the drug court term of probation because of strong rehabilitation goals in juvenile proceedings and the state's role of acting as *parens patriae* in the best interests of the child.[116]

As a related issue, courts have addressed whether illegal alien status is a proper consideration in determining eligibility for drug court status. Although not reaching the equal protection issue, the California Appellate Courts have held illegal status is a proper consideration in determining eligibility for drug court and probation.[117]

IX. [§8.9] RIGHT TO COUNSEL

"In all criminal prosecutions, the accused shall have the right… to have the Assistance of Counsel for his defense"

~ U.S. Constitution[118]

The right to counsel extends to all felony prosecutions and to misdemeanor prosecutions where incarceration is actually imposed.[119] The right to counsel attaches at every critical stage of the proceedings, after initiation of adversarial judicial proceedings.[120]

Probation and parole revocation proceedings are not considered a critical stage under the federal constitution,[121] but virtually every state requires counsel at probation revocation proceedings if the defendant so requests. Some jurisdictions have held that a modification of the terms of probation is a critical stage of the proceedings, where the right to counsel attaches, at least where the modification adds significant terms to probation.[122] If the sanctioning process is analogous to modification of probation (and the author believes it is), defense counsel should be present at the proceeding if this line of precedent applies. Of course, the defendant can waive his right to counsel.[123] Before permitting a waiver, the court should make a searching inquiry into the defendant's understanding of the right to counsel, including the disadvantages of self-representation.[124] The sentencing hearing is a critical stage of the proceeding and counsel should be present, absent a waiver. [125]

X. [§8.10] DOUBLE JEOPARDY

"[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb" [126]

~ U.S. Constitution

The Double Jeopardy Clause protects against a second prosecution for the same offense after either an acquittal or a conviction and multiple criminal punishments for the same offense.[127] The double jeopardy prohibition against being punished multiple times for the same offense does not prevent consideration of misconduct, such as positive urine tests, upon imposition of the original sentence or upon resentencing.[128] Although the Double Jeopardy Clause prohibits multiple criminal penalties for the same conduct, vehicle forfeitures and driver's license revocations do not violate the Double Jeopardy Clause because they are administrative rather than penal in nature.[129]

Generally, double jeopardy does not apply to disciplinary, probation, parole, or bond revocation proceedings.[130] In a recent decision, the North Dakota Supreme Court held that the imposition of drug court sanctions did not bar a subsequent prosecution and conviction for the identical conduct upon which the sanctions were based.[131] However, adding additional conditions to a defendant's probation, such as drug court, without a violation of probation violates double jeopardy.[132] Although most jurisdictions consider juvenile delinquency proceedings to be civil in nature, the Double Jeopardy Clause applies to any juvenile proceeding that has the potential to deprive the juvenile of liberty.[133]

XI. [§8.11] RELATED ISSUES

A recent case from the California Supreme Court held that dependency drug courts do not have the authority through use of the court's contempt powers to impose jail sentences on parents who are not compliant with their treatment or testing regimens. [134] The *Nolan* court reasoned that because reunification services are voluntary, the statutory

scheme only permits loss of custody and termination of parental rights as the consequence for parental noncompliance with ordered reunification services.[135]

In *Brown v. State*, the Maryland Public Defender's Office filed an action attacking the fundamental jurisdiction of the courts to set up and run a drug court program.[136] The highest appellate court in Maryland rejected the Public Defender's argument, holding that the Appellant confused lack of jurisdiction with acting in excess of jurisdiction and also rejected the double jeopardy contention as not being timely raised.

XII. [§8.12] CONCLUSION

Drug court legal obligations are dictated by state statutory and constitutional requirements and the minimum mandates of the United States Constitution. In some circumstances, the author's proffered legal standards exceed those required by the U.S. Supreme Court and state law. In particular, the author believes the following practices constitute the best practices in the drug court field:

- Determine the availability of nondeity based 12-step alternatives to AA and NA in the community and encourage their development, if not available.
- Ensure that drug court participants are fully informed of the consequences of drug court enrollment, and that the surrender of any rights by the participant is done knowingly, voluntarily, and intelligently.
- Provide drug court participants due process rights at probation revocation hearings, drug court termination proceedings, and at sanction proceedings where jail is a potential sanction and where the defendant contests the underlying factual basis for the alleged violation.
- When contested, sanctioning hearings should be expedited. Expedition should, of course, be tempered by giving counsel and sufficient time to the drug court participant to prepare.
- Require retesting, by instrumented confirmation of any on-site, noninstrumented positive drug test unless the drug court participant acknowledges use.

Adherence to constitutional and statutory requirements, as may be supplemented by the author's recommended enhancements, when coupled with effective therapeutic drug court practices, will ensure the drug court participant has the best opportunity to obtain sobriety.

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1 For example, working the 12-steps requires that the participant confess to God "the nature of our wrongs" (Step 5), appeal to God to "remove our short comings" (Step 7), and make "contact" with God to achieve the "knowledge of his will" by "prayer and meditation" (Step 11). See Alcoholics Anonymous 59-60 (3rd ed. 1976); Narcotics Anonymous, Hospitals and Institutions Handbook 2 (2006). In fact, the 12-steps basic text of Alcoholics Anonymous and Narcotics Anonymous mentions God in five of the twelve tenets. Alcoholics Anonymous 59-60 (3rd ed. 1976); Narcotics Anonymous, Hospitals and Institutions Handbook 2 (2006).

2 The 1st Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the full exercise thereof. . ." U.S. CONST. amend. I. The 1st Amendment of the U.S. Constitution applies to the states via the 14th Amendment of the U.S. Constitution. *Id.;* U.S. CONST. amend. XIV. *See also* Lee v. Weisman, 505 U.S. 577, 587 (1992).

3 Kerr v. Farrey, 95 F.3d 472, 479-80 (7th Cir. 1996) (holding that the prison violated the Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used "God" in its treatment approach); Griffin v.

Coughlin, 673 N.E.2d 98, 98 (N.Y. 1996), *cert. denied,* 519 U.S. 1054 (1997) (holding that conditioning desirable privilege—family visitation—on prisoner's participation in program that incorporated Alcoholics Anonymous doctrine was unconstitutional because it violated the Establishment Clause); Warner v. Orange County Dep't of Prob., 115 F.3d 1068, 1068 (2d Cir. 1997), *aff'd,* 173 F.3d 120 (2d Cir. 1999), *cert. denied,* 528 U.S. 1003 (1999) (holding that the county governmental agency violated the Establishment Clause by requiring DUI probationer to participate in A.A.). *See also* Bausch v. Sumiec, 139 F. Supp. 2d 1029, 1029 (E.D. Wis. 2001); Arnold v. Tenn. Bd. of Trs., 956 S.W. 2d 478, 484 (Tenn. 1997); *In re* Garcia, 24 P.3d 1091, 1091 (Wash. Ct. App. 2001); Rauser v. Horn, No. 98-1538, 1999 U.S. Dist. LEXIS 22580 (W.D. Pa. Dec. 3, 1999), *rev'd on other grounds,* 241 F.3d 330 (3rd Cir. 2001); Alexander v. Schenk, 118 F. Supp. 2d 298, 300 n.1 (N.D. NY 2000); Yates v. Cunningham, 70 F. Supp. 2d 47, 49 (D.N.H. 1999); Warburton v. Underwood, 2 F. Supp. 2d 306, 316-318 (W.D.N.Y 1998); Inouye v. Kemna, 504 F.3d 705, 705 (9th Cir. 2007) (concluding that parole officer had lost qualified immunity because he forced AA on Buddhist); Hanas v. Inner City Christian Outreach, 542 F. Supp. 2d 683, 683 (E.D. Mich. 2008) (holding that the drug court program manager and the drug court consultant were liable for actions related to referral to faith based program, when they knew of participant's objections while in the program, and when the program denied the participant the opportunity to practice his chosen faith—Catholicism); Thorne v. Hale, No. 1:08cv601 (JCC), 2009 WL 980136 (E.D. Va. 2009) (holding that a valid § 1983 civil rights claim was presented in the complaint, where the complaint stated that Hale and Killian were to some extent responsible for implementing the treatment regimen which included mandatory participation in AA/NA); Compl. at 15, Thorne v. Hale, No. 1:08cv601 (JCC), 2009 WL 980136 (E.D. Va. Mar. 26, 2009) (claiming that Killian "was responsible for all recommendations to Drug Court for treatment and clinical matters," including "substance abuse issues."); *id.* at 76 (claiming that Thorne was "subjected to the State religions of AA and NA by. . . [the] directors" of the Drug Court and the RACSB); id. at 89 (alleging due process deprivations by the "Directors" of the RACSB and the Drug Court). Members of the drug court ultimately prevailed in the *Thorne v. Hale* litigation, when the trial court granted summary judgment on the basis of absolute judicial immunity and dismissed the case. *Id.* The Fourth Circuit affirmed the granting of the summary judgment motion. *Thorne v. Hale,* No. 09-2305, WL1018048 (4th Cir. Mar. 19, 2010). *Thorne v. Hale* is noteworthy, even in light of the dismissal, because the initial dismissal motion was denied and because, when coupled with *Hanas v. Inner City Christian Outreach,* the authority makes it patently clear that First Amendment violations can have consequences for drug court staff. *Id. Hanas,* 542 F. Supp. 2d at 683.

4 Cox v. Miller, 296 F.3d 89, 89 (2d Cir. 2002) (holding that a confession to murder in an AA meeting was not protected by cleric-congregant privilege, despite 5th step requiring participant to admit to God, other human beings, and themselves the exact nature of their wrongs).

5 Kerr v. Farrey, 95 F.3d 472, 479 (7th Cir. 1996).

6 O'Connor v. California, 855 F. Supp. 303, 308 (C.D. Cal. 1994) (finding that the Establishment Clause was not violated because the DUI probationer had several choices of programs, including self-help programs that are not premised on monotheistic deity); *In re* Garcia, 24 P.3d 1091, 1093 (Wash. Ct. App. 2001); Americans United v. Prison Fellowship, 509 F.3d 406, 406 (8th Cir. 2007) (holding that a state supported non-coercive, non-rewarding faith based program violated the Establishment Clause of the U.S. Constitution because an alternative was not available).

7 Bausch v. Sumiec, 139 F. Supp. 2d 1029, 1036 (E.D. Wis. 2001) (stating that the choices needed to be made known to the participant). *See also* De Stephano v. Emergency Housing Group, 247 F.3d 397, 397 (2d Cir. 2001).

8 A variety of programs exist. *See, e.g.,* Smart Recovery, http://www.smartrecovery.org (last visited Aug. 1, 2010); Agnostic AAnyc.org, http://www.agnosticaanyc.org (last visited Aug. 1, 2010); Rational Recovery, http://www.rational.org (last visited Aug. 1, 2010).

9 The 1st Amendment of the U.S. Constitution states that "congress shall make no law. . . abridging the freedom of speech." U.S. CONST. amend. I. *See also* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); Bd. of Directors v. Rotary Club, 481 U.S. 537, 544 (1987).

10 Oyoghok v. Municipality of Anchorage, 641 P.2d 1267, 1267 (Alaska Ct. App. 1982) (conditioning probation on not being within a two block radius); Johnson v. State, 547 So. 2d 1048, 1048 (Fla. Dist. Ct. App. 1989) (prohibiting defendant from being near high drug areas); State v. Morgan, 389 So. 2d 364, 364 (La. 1980) (prohibiting entrance into the French Quarter); State v. Stanford, 900 P.2d 157, 157 (Haw. 1995) (supporting a prohibition against entering Waikiki area); People v. Pickens, 542 N.E.2d 1253, 1253 (Ill. App. Ct. 1989). *But see* People v. Beach, 195 Cal. Rptr. 381, 385 (Cal. Ct. App. 1983) (holding unconstitutional defendant's banishment from the community where she has lived for the last 24 years); State v. Wright, 739 N.E.2d 1172, 1172 (Ohio Ct. App. 2000) (reversing prohibition of entering any place where alcohol is distributed, served, consumed, given away, or sold because it restricted the defendant from grocery stores and the vast majority of all residences).

11 *See* People v. Rizzo, 842 N.E.2d 727, 727 (Ill. App. Ct. 2005).

12 Andrews v. State, 623 S.E.2d 247, 247 (Ga. Ct. App. 2005) (restricting drug court participant from associating with drug users and dealers); People v. Jungers, 25 Cal. Rptr. 3d 873, 873 (Cal. Ct. App. 2005) (prohibiting contact with wife). *But see* Dawson v. State, 894 P.2d 672, 672 (Alaska Ct. App. 1995) (holding the restriction of unsupervised contact with drug using wife was too broad); People v. Forsythe, 43 P.3d 652, 652 (Colo. App. Ct. 2001) (prohibiting unsupervised contact with his own children); Jones v. State, 41 P.3d 1247, 1247 (Wyo. 2001) (prohibiting contact with persons of disreputable character); State v. Hearn, 128 P.3d 139, 139 (Wash. Ct. App. 2006) (prohibiting the association with drug users or dealers is constitutional); Birzon v. King, 469 F.2d 1241, 1242 (2d Cir. 1972); Commonwealth v. LaPointe, 759 N.E.2d 294, 294 (Mass. 2001).

13 Griffin v. Wisconsin, 483 U.S. 868, 868 (1987).

14 United States v. Knights, 534 U.S. 112, 112 (2001).

15 Samson v. California, 547 U.S. 847, 843 (2006).

16 State v. Kouba, 709 N.W. 2d 299, 299 (Minn. Ct. App. 2006) (recognizing that a waiver is sufficient in probation cases); State *ex rel.* A.C.C., 44 P.3d 708, 708 (Utah 2002) (recognizing waiver in juvenile case, but limited case to the facts); State v. McAuliffe, 125 P.3d 276, 276 (Wyo. 2005) (recognizing complete waiver, but search must be reasonable).

17 *Compare* State v. Ullring, 741 A.2d 1065, 1065 (Me. 1999) (holding that a search waiver as a condition of bond is constitutional), *and In re* York, 40 Cal. Rptr. 2d 308, 308 (Cal. 1995), *with* Terry v. Superior Court, 86 Cal. Rptr. 2d 653, 653 (Cal. Ct. App. 1999) (holding that a 4th Amendment waiver is an improper condition in diversion case, without statutory authority), *and* United States v. Scott, 450 F.3d 863, 863 (9th Cir. 2006) (concluding that a search waiver is probably improper when a person is on bond). *See also* Butler v. Kato, 154 P.3d 259, 259 (Wash. Ct. App. 2007).

18 *See* United States v. Jordan, 485 F.3d 982, 982 (7th Cir. 2007) (holding that alcohol use restrictions as part of supervised release should be based upon need).

19 United States v. Scott, 424 F.3d 888, 888 (9th Cir. 2005) (drawing distinction).

20 Steiner v. State, 763 N.E. 2d 1024, 1024 (Ind. Ct. App. 2002); Oliver v. U.S., 682 A.2d 186, 192 (D.C. Cir. 1996); State v. Ullring, 741 A.2d 1045, 1045 (Me. 1999).

21 Berry v. Dist. of Columbia, 833 F.2d 1031, 1035 (D.C. Cir. 1987).

22 *See, e.g.,* State v. Patton, 119 P.3d 250, 250 (Ore. Ct. App. 2005); Payne v. State, 615 S.E. 2d 564, 564 (Ga. Ct. App. 2005); Commonwealth v. Williams, 801 N.E. 2d 804, 804 (Mass. App. Ct. 2004); Martin v. State, 517 P.2d 1399, 1399 (Alaska 1974); Carswell v. State, 721 N.E.2d 1255, 1255 (Ind. Ct. App. 1999); People v. Balestra, 90 Cal. Rptr. 2d 77 (Cal. Ct. App. 1999).

23 People v. Beal, 70 Cal. Rptr. 2d 80, 80 (Cal. Ct. App. 1997).

24 Martell v. County Court, 854 P.2d 1327, 1327 (Colo. Ct. App. 1992) (holding that if a condition of bail is to refrain from the use of alcohol or drugs, supervision may include drug or alcohol testing); State v. Magnuson, 606 N.W. 2d 536, 536 (Wis. 2000).

25 U.S. CONST. amend. XIV.

26 *See* Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Movement,* 76 WASH. U. L. Q. 1205, 1233-1234 (1998); *In re* Hill, 803 N.Y.S. 2d 365, 365 (N.Y. 2005).

27 NAT'L. ASS'N. OF DRUG COURT PROF'LS & BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997).

28 Fuentes v. Shevin, 407 U.S. 67, 67 (1972).

29 Morrissey v. Brewer, 408 U.S. 471, 471 (1972).

30 *Id.* at 481.

31 Both due process and equal protection concerns can arise in cases involving access to justice. Due process is generally concerned with the opportunity to obtain a fair adjudication on the merits while equal protection is designed to insure no differential treatment to two similarly situated classes of offenders. See Evitts v. Lucey, 469 U.S. 387, 387 (1985) (holding that an indigents right is the same as a wealthy person's right to receive effective assistance of counsel for first appeal of right).

32 State v. Melick, 129 P.3d 816, 816 (Wash. Ct. App. 2006); Adams v. Peterson, 968 F.2d 835, 835 (9th Cir. 1992) (holding that a showing of a knowing, voluntary and intelligent waiver must be present and that the full Boykin v. Alabama, 395 U.S. 238, 238 (1969) inquiry is not necessary to implement waivers to a stipulated fact trial); State *ex rel.* T.M., 765 A.2d 735, 735 (N.J. 2001); People v. Anderson, 833 N.E.2d 390, 394-95 (Ill. App. 2005).

33 State v. Drum, 225 P.3d 237, 237 (Wash. 2010) (holding that a drug court contract was not equivalent to a guilty plea, but more akin to a deferred prosecution, and that a court must still make a determination of the legal sufficiency of the evidence to convict, irrespective of stipulation by the parties); State v. Colquitt, 137 P. 3d 892, 892 (Wash. Ct. App. 2006).

34 People v. Byrnes, 813 N.Y.S. 2d 924, 924 (N.Y. App. Div. 2006); Wall v. State, No. 212, 2005 Del. LEXIS 17 (Del. 2005); State v. Bellville, 705 N.W.2d 506, 506 (Iowa Ct. App. 2005) (holding that the defendant must know he has the right and is surrendering the right to appeal before it can be said that he waived the right to appeal); People v. Conway, 845 N.Y.S.2d 545, 545 (N.Y. App. Div. 2007) (addressing the waiver of appeal).

35 State v. Jones, 131 Wash. App. 1021, 1021 (Wash. Ct. App. 2006) (addressing a search waiver); Wilkinson v. State, 641 S.E.2d 189, 189 (Ga. Ct. App. 2006). As part of her drug court contract the defendant waived her ability to contest a search and move for recusal of the drug court judge. *Id.*

36 Laxton v. State, 256 S.W. 3d 518, 518 (Ark. Ct. App. 2007) (holding that drug court participant was not entitled to "sanction" jail time as credit because such credit was not included in the contract); Commonwealth v. Fowler, 930 A.2d 586, 586 (Pa. 2007) (holding that because defendant voluntarily entered program, he was not entitled to presentence credit for time spent in inpatient program); People v. Black, 176 Cal. App. 4th 145, 97 Cal. Rptr. 3d 338, 338 (Cal. Ct. App. 2009) (holding that the defendant waived pre drug court incarceration credit to enter drug court program). *But see* Commonwealth v. Gaddie, 239 S.W.3d 59, 59 (Ky. 2007) (holding that the court did

not have jurisdiction to increase suspended sentence from 180 days to 1 year, even though the defendant agreed to modification in order to enter drug court). *See also* House v. State, No. 48A02-0806-CR-537 (Ind. Ct. App. Feb. 2, 2009).

37 Smith v. State, 840 So.2d 404, 404 (Fla. Dist. Ct. 2003); Louis v. State, 994 So.2d 1190, 1190 (Fla. Dist. Ct. App. 2007) (determining whether there was ineffective assistance of counsel for not advising client of drug court).

38 People v. Anderson, 833 N.E.2d 390, 390 (Ill. App. Ct. 2005) (holding that drug court termination requires hearing); State v. Perkins, 661 S.E. 2d 366, 366 (S.C. Ct. App. 2008) (holding that termination decision not reviewable but defendant entitled to notice and hearing on whether defendant violated conditions of his suspended sentence by being terminated from drug court). *See also infra* note 40.

39 State v. Varnell, 155 P.3d 971, 971 (Wash. Ct. App. 2007).

40 *See* People v. Anderson, 833 N.E.2d 390, 390 (Ill. App. Ct. 2005); State v. Cassill-Skilton, 94 P.3d 407, 410 (Wash. Ct. App. 2004); Hagar v. State, 990 P.2d 894, 899 (Okla. Crim. App. 1999); State v. Rogers, No. 31264, 2006 WL 2422648 (Ida. Ct. App. Aug. 22, 2006) (holding that contract waived such protections when knowingly and intelligently entered into), *rev'd,* State v. Rogers, 170 P. 3d 881, 881 (Idaho 2007) (holding that termination hearings required in drug courts, at least where defendant pled guilty and sentence deferred).

41 Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973).

42 *Id.* at 786.

43 Black v. Romano, 471 U.S. 606, 612 (1983). *See also* Lawson v. State, 969 So.2d 222, 222 (Fla. 2007) (holding that the right to receive adequate notice of the conditions of probation is in part realized through the requirement that a violation be substantial and willful, however, the court need not define how many violations it will take to constitute a willful violation). *Id.*

44 Gagnon, 411 U.S. at 781-2.

45 *Compare* Staley v. State, 851 So.2d 805 (Fla. Dist. Ct. App. 2003), *with* State v. Rogers, No. 31264, 2006 WL 2422648 (Ida. Ct. App. Aug. 22, 2006).

46 *Staley,* 851 So.2d at 807.

47 State v. Rogers, No. 31264, 2006 WL 2422648, at 170 (Ida. Ct. App. Aug. 22, 2006) (holding that revocation hearing required not just recommended). *See also* Laxton v. State, 256 S.W. 3d 518, 518 (Ark. Ct. App. 2007) (holding that drug court participant was not entitled to "sanction" jail time as credit).

48 *Id.,* State v. Rogers, No. 31264, 2006 WL 2422648, at 170. In *State v. Rogers* the Appellate court noted that the drug court judge did provide the drug court participant sufficient constitutional protections at the hearing. *See id.* at 170 n.15.

49 State v. Rogers, 170 P.3d 881, 881 (Idaho 2007).

50 *Id.* at 882.

51 People v. Kimmel, 882 N.Y.S.2d 895, 895 (2009) (relying upon Torres v. Berbary, 340 F. 3d 63, 63 (2d Cir. 2003)). Although Kimmel is not appellate precedent, it is recommended reading because of its analysis if the issue. *See also* People v. Woods, 748 N.Y.S.2d 222, 222 (2002) (holding that the defendant was not entitled to a hearing, but noting every review was a hearing in which the defendant had an opportunity to participate.)

52 Gosha v. State, 927 N.E.2d 942, 942 (Ind. Ct. App. 2010). In *Gosha v. State,* the Court explained that termination from drug court requires the written notice of the claimed violations, the disclosure of the evidence against the defendant, the opportunity to be heard and present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body. *Id. See also* Harris v. Commonwealth, 689 S.E.2d 713, 713 (Va. 2010) ("Consequently, because Harris had no opportunity to participate in the termination decision, when deciding whether to revoke Harris' liberty and impose the terms of the plea agreement deprived Harris of the opportunity to be heard regarding the propriety of the revocation of his liberty interest.") Id.

53 *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). However, where the probation revocation hearing is combined with an original sentencing, the defendant is entitled to counsel. Mempa v. Rhay, 389 U.S. 128, 128 (1967). *See also* Dunson v. Kentucky, 57 S.W.3d 847, 847 (Ky. Ct. App. 2001) (concluding that defendant's assertions that he was denied counsel were unfounded because he was never without counsel at any critical stage of the proceedings).

54 *See* Commonwealth v. Wilcox, 841 N.E.2d 1240, 1240 (2006); State v. Kouba, 709 N.W.2d 299, 299 (Minn. Ct. App. 2006); State v. Matey, 891 A.2d 592, 592 (N.H. 2006); State v. Yarborough, 612 S.E.2d 447, 447 (N.C. Ct. App. 2005); *Dunson,* 57 S.W.3d at 847.

55 *See* Argersinger v. Hamlin, 407 U.S. 654, 654 (1974) (holding that for any misdemeanor or petty offense trial that results in a jail sentence the defendant must be represented by counsel); Scott v. Illinois, 440 U.S. 367, 367 (1979) (holding that the defendant was not entitled to counsel at trial, where the offense the defendant was charged with authorized jail, but incarceration was never imposed); Alabama v. Shelton, 535 U.S. 654, 654 (2002) (explaining that where the defendant was not represented by counsel at trial, was convicted and received probation, and a suspended jail sentence, the jail sentence could never be imposed because defendant was not represented by counsel at trial).

56 Minnesota v. Murphy, 465 U.S. 420, 435 (1984).

57 Morgan v. Wainwright, 676 F.2d 476, 476 (11th Cir. 1982).

58 Pennsylvania v. Goldhammer, 474 U.S. 28, 28 (1985).

59 United States v. Steiner Warren, 335 F.3d 76, 76 (2d Cir. 2003).

60 *Compare* State v. Foster, 782 A.2d 98, 98 (Conn. 2001), *and* United States v. Gravina, 906 F. Supp. 50, 53-54 (D. Mass. 1995), *with* State v. Scarlett, 800 So.2d 220, 222 (Fla. 2001).

61 Minnesota v. Murphy, 465 U.S. 420, 426-436 (1985).

62 United States v. Mackinzie, 601 F.2d 221, 221 (5th Cir. 1979).

63 *See, e.g.,* State v. Sylvia, 871 A.2d 954, 954 (R.I. 2005); Wiede v. State, 157 S.W.3d 87, 87 (Tex. Crim. App. 2005). *Cf.* People v. Harrison, 771 P.2d 23, 23 (Colo. Ct. App. 1989). In *People v. Harrison,* the court explained that the standard of proof is preponderance of the evidence, unless there is an allegation of a new crime. *Id.* If there is an allegation of a new crime, and the defendant has not been convicted, the standard of proof is beyond a reasonable doubt. *Id.*

64 United States v. Pierre, 47 F.3d 241, 241 (7th Cir. 1995); State v. Johnson, 679 N.W.2d 169, 174 (Minn. Ct. App. 2004) (collecting cases).

65 Black v. Romano, 471 U.S. 606, 610-611 (1983); Bearden v. Georgia, 461 U.S. 660, 660 (1983) (holding that fundamental fairness prohibited revoking probation for failure to pay restitution when defendant could not pay).

66 People v. Joseph, 785 N.Y.S.2d 292, 291 (N.Y. Sup. Ct. 2004) (adopting Torres v. Berbary, 340 F.3d 63, 63 (2d Cir. 2003)).

67 Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 593-4 (1993). In this case the multifactor analysis includes: whether the technique can and has been tested; whether the technique has been subject to peer review and testing; the techniques known or potential rate of error; whether there are standards controlling the technique's operation and whether the technique is generally accepted in the scientific field from which it arises. *Id.*

68 Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923).

69 People v. Shreck, 22 P.3d 68, 68 (Colo. 2001).

70 Mitchell v. Mt. Hood Meadows, 99 P.3d 748, 748 (Ore. Ct. App. 2004) (combining Fed. R. Evid. 702, Fed. R. Evid. 403, and the Daubert and other factors to determine the admissibility of urine testing results for marijuana and the degree of impairment).

71 Additional specimens collected for testing include blood and saliva. Eye scanning devices are occasionally used to determine impairment and recent use.

72 *See* Lahey v. Kelly, 518 N.E.2d 924, 924 (N.Y. 1987).

73 Spence v. Farrier, 807 F.2d 753, 756 (8th Cir. 1986); People v. Whalen, 766 N.Y.S.2d 458, 460 (N.Y. App. Div. 2003); Jones v. State 548 A.2d 35, 35 (D.C. 1998) (citing 6 jurisdictions that held EMIT to be reliable).

74 Louis v. Dep't of Corr., 437 F.3d 697, 697 (8th Cir. 2006); Lahey v. Kelly, 518 N.E.2d 135, 135 (N.Y. 1987); Peranzo v. Coughlin, 608 F. Supp. 1504, 1504 (S.D.N.Y. 1985); aff'd, 850 F.2d 125, 126 (2d Cir. 1988). But see State v. Kelly, 770 A.2d 908, 908 (Conn. 2001) (holding that the blood stain analysis by EMIT should have been confirmed by gas chromatography/mass spectroscopy).

75 Hernandez v. State, 116 S.W.3d 26, 44-46 (Tex. Crim. App. 2003) (citing 6 cases upholding FPIA); People v. Toran, 580 N.E.2d 595, 597 (Ill. App. Ct. 1991) (relying on thin layer chromatography).

76 *See, e.g.,* Grinstead v. State, 605 S.E.2d 417, 417 (Ga. Ct. App. 2004); Anderson v. McKune, 937 P.2d 16, 18 (Kan. Ct. App. 1997); Black v. State, 794 N.E.2d 561, 561 (Ind. Ct. App. 2003).

77 Willis v. Roche Biomedical Lab, 61 F.3d 313, 313 (5th Cir. 1995) (concluding that the on-site test was false positive for methamphetamine due to cold medicine consumption).

78 GC/MS is almost always reliable assuming proper storage, handling, measurement and collection techniques. Nat'l Treasury Employees Union v. Von Raub, 489 U.S. 656, 656 (1989); Wilcox v. State, 258 S.W.3d 785, 785 (Ark. Ct. App. 2007) (explaining that the test was not reliable because the pH level and temperature was not established).

79 *See, e.g.,* Louis v. Dep't. of Corr. Servs. of Neb., 437 F.3d 697, 697 (8th Cir. 2006).

80 *See, e.g.,* United States v. Gatewood, 370 F.3d 1055, 1055 (10th Cir. 2004) (holding that the use of drugs on pretrial release was relevant to defendant's acceptance of responsibility and that lying about use of drugs is grounds for denying downward departure from presumptive sentence).

81 *See* United States v. Bentham, 414 F. Supp. 2d 472, 471 (S.D.N.Y. 2006).

82 *See* United States v. Alfonso, 284 F.Supp.2d 193, 197-98 (D. Mass. 2003); United States v. Meyer, 485 F. Supp.2d 1001, 1001 (N.D. Iowa 2006); United States v. Snyder, 187 F. Supp. 2d 52, 59-60 (N.D.N.Y. 2002); United States v. Stumpf, 54 F. Supp. 2d 972, 972 (Nev. 1999); United States v. Gatewood, 370 F.3d 1055, 1055 (10th Cir. 2004).

83 *See* Woods v. Wills, No. 1:03-CV105, 2005 U.S. Dist. LEXIS 28851, at *29 (E.D. Mo. Oct. 27, 2005); *In re* S.W. 168 S.W. 3d 878 (Tex. App. 2005).

84 Berry v. Nat'l Med. Servs., *205 P.3d 745, 745* (Kan. App. Apr. 3, 2009).

85 Johnson v. State Med. Bd., 147 Ohio Misc.2d 121 (2008); Perez-Rocha v, Commonwealth, 933 A.2d 1102 (Pa. Commw. Ct. 2007).

86 Wykoff v. Resig, 613 F.Supp. 1504, 1513-1514 (N.D. Ind. 1985), *aff'd in unpub. opin.,* 819 F.2d 1143 (7th Cir. 1987); Thomas v. McBride, 3 F. Supp. 2d 989 (N.D. Ind. 1998).

87 Baxter v. Nebraska Dep't of Corr., 663 N.W.2d 136 (Neb. App. 2003); Noreault v. Coombe, 660 N.Y.S.2d 71, 71 (N.Y. App. Div. 1997). *See also id.* at n.65.

88 Judicial impartiality has not only due process ramifications but also potential disciplinary consequences for the judge.

89 *In re* Murchison, 349 U.S. 133, 136-139 (1955) (recusing a judge because he could not detach himself from personal knowledge of secret grand jury proceedings).

90 United States v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002) (stating that the standard is whether the facts, as asserted, lead an objective reasonable observer to question the judge's impartiality).

91 Liteky v. United States, 510 U.S. 540, 555 (1994). *See, e.g.,* United States v. Microsoft, 253 F.3d 34, 117 (D.C. Cir. 2001) (holding that the judge's comments to the press while the case was pending demonstrated bias); Youn v. Track, 324 F.3d 409, 423 (6th Cir. 2003) (holding that the court's comments and rulings do not show bias when they were based upon evidence acquired during proceedings).

92 *Compare* United States v. Bailey, 175 F.3d 966, 969 (11th Cir. 1999) (holding that recusal was not required where judge received facts from judicial source), *with* Edgar v. K.L., 93 F.3d 256, 259 (7th Cir. 1996) (holding that judge who received off the record briefings had extra judicial personal knowledge of facts).

93 Alexander v. State, 48 P.3d 110, 115 (Okla. Crim. App. 2002). *But see* Wilkinson v. State, 641 S.E.2d 189, 191 (Ga. Ct. App. 2006). As part of her drug court contract the defendant waived her ability to move for recusal of the drug court judge. *Id.*

94 State v. Belyea, No. 2009-038, 2010 N.H. LEXIS 49 (N.H. May, 20, 2010) (holding that the defendant failed to show that a reasonable person would entertain significant concern about whether Judge Vaughan prejudged the facts or abandoned or compromised his impartiality in his judicial role on the drug court team). In this case, the court did not have extrajudicial facts. *Id.;* Ford v. Kentucky, and William E. Flener v. Kentucky, No. 2008-CA-001990-MR, No. 2009-CA-000889-MR, No. 2009-CA-000461-MR, 2010 Ky. App. Unpub. LEXIS 380 (Ky. Appellate Apr. 30, 2010) (holding that having same judge preside over drug court and revocation hearing is not a denial of right to impartial hearing/due process).

95 If continuing on the case would create an appearance of impropriety, such non-recusal would implicate Canon 2 of the Canons of Judicial Conduct. Model Code of Judicial Conduct R. 2.11 (2007). Similarly, if the judge has personal knowledge of the facts, the Canons of judicial Conduct may be implicated. See Inquiry of Baker, 74 P.3d 1077, 1077 (Or. 2003) (censuring judge for failing to disqualify herself from probation revocation hearing in which the events giving rise to the proceeding occurred at a restaurant in front of judge); Lozano v. State, 751 P.2d 1326, 1326 (Wyo. 1988) (holding that the mere fact that probation revocation judge witnessed defendant in bar drinking in violation of her probation was not error, where the defendant freely admitted she was drinking in violation of probation).

96 *See* discussion *supra* pp. 8-10.

97 *See supra* notes 33-34.

98 Wolff v. McDonnell, 418 U.S. 539, 557 (1974); Sandlin v. Conner, 515 U.S. 472, 472 (1995).

99 There is some debate, at least in one state, as to whether jail can be a sanction in a pre-plea "opt in" drug court program. *Compare* Diaz v. State, 884 So. 2d 299, 299 (Fla. Dist. Ct. App. 2004) (holding that jail cannot be used as a sanction in a pre-plea contractual drug court program), *and* Walker v. Lamberti, 29 So. 3d 1172, 1172 (Fla. Dist. Ct. App. 2010) (holding that a defendant who voluntarily agreed to participate in drug court cannot subsequently opt out to avoid jail–based drug treatment program), *with* Mullin v. Jenne, 890 So. 2d 543, 543 (Fla. Dist. Ct. App. 2005) (holding that jail can be used as a sanction for defendants who choose to remain in voluntary program).

100 *See* Staley v. State, 851 So. 2d 805, 805 (Fla. Dist. Ct. App. 2003) (concluding that waiver of hearing rights in a drug court contract impugns the integrity of the justice system and undermines public confidence in the judiciary); T.N. v. Portesy, 932 So. 2d 267, 267 (Fla. Dist. Ct. App 2005) (holding that a court cannot impose sanctions beyond those authorized by statute, even if agreed to by the juvenile drug court participant upon entry into program); State v. Rogers, 170 P.3d 881, 881 (Idaho 2007) (holding that termination hearings are required in drug courts, at least where defendant pled guilty and his was sentence deferred, but also noting in dicta that such requirements are not required when sanctions are imposed). Of particular concern to the author are cases such as Thorne v. Hale, No. 1:08cv601 (JCC), 2009 WL 980136 (E.D. Va. Mar. 26, 2009), *aff'd, Thorne v. Hale,* No. 09-2305, WL1018048 (4th Cir. Mar. 19, 2010), where the §1983 claimant was unsuccessful because of procedural requirements and absolute judicial immunity. *Id.* In this case, the federal court makes staffings and the sanctioning process sound like a Star Chamber: "Thorne claims that, during the 'sanctions' hearings that followed his failure to adhere to the drug court's rules, the allegations against him, the testimony of witnesses, and the presentation of evidence violated his Sixth Amendment rights. *Id.* at 57. Testimony, he asserts, was "made in secrete [sic] between the Drug Court and RACSB administrators, {Defendants Kelly Hale, Judith Alston and Sharon Gillian}," the RACSB, the Commonwealth's Attorney, and the state court judge, "to include whispered testimony to the presiding Judge at the bench, so as to exclude Plaintiff. . . from all measures of defense and redress commensurate with Due and Compulsory Process of Law." *Id.* Courts are requiring that substantive matters that affect a drug

court participant's due process rights be on the record so meaningful appellate review can occur. *See* Tyler T., 279 Neb. 806, 806 (2010) ("Given the therapeutic component of problem-solving-court programs, we are not prepared to say that each and every action taken in such a proceeding must be a matter of record. But we have no difficulty in concluding that when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation, the proceeding must be on the record. We agree with other courts which have held that where a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected.").

101 *In re* Miguel, 63 P.3d 1065, 1065 (Ariz. App. 2003). The Arizona Appellate Court appeared to endorse a similar procedure when the juvenile defendants raised the due process issue and the possibility of jail or detention sanctions at a review hearing. Id. See also Nicely v. Commonwealth, 2007-CA-002109-MR, 2009 Ky. App. LEXIS 54 (Ky. App. Apr. 24, 2009).

> Under these circumstances, if a sentencing court chooses to find a defendant in contempt for violating conditions of probation as opposed to revoking or modifying the conditions of probation, the defendant must be afforded certain due process rights, including a hearing. Pace, supra at 395. There is no evidence from the record presented to us that any hearings were held or that the trial court made a finding of contempt at any time during the course of Nicely's probation. To the contrary, each time Nicely was incarcerated, the court order clearly recited violations of the terms and conditions of the Drug Court Program. If the record were silent, we would remand this matter back to the trial court for an appropriate evidentiary hearing consistent with the holding in Cooke, supra. But, since the court previously found that Nicely violated the conditions of Drug Court, we believe the trial court abused its discretion when, nunc pro tunc, it found him in contempt as well.
>
> *Id.*

102 Resort to a revocation/termination petition with immediate remand may be appropriate, when the prosecutor feels that public safety may be jeopardized, if the drug court participant does not accept responsibility for the alleged non-compliant behavior.

103 State v. Paige, 880 N.E.2d 675, 675 (Ill. App. 2007).

104 *Id.* at 684.

105 U.S. CONST. amend. XIV.

106 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 200 (1996); Johnson v. California, 543 U.S. 499, 514 (2005) (stating that the strict scrutiny test requires that the classification must serve a compelling state interest and be narrowly tailored to meet that interest).

107 Miss. Univ. for Women v. Hogan, 458 U.S. 718, 718 (1982).

108 McGowan v. Maryland, 366 U.S. 420, 425-426 (1961); Estelle v. Dorough, 420 U.S. 534, 534 (1975).

109 Participation in a drug court is not a fundamental right and drug offenders are not a part of any suspect or semi-suspect class. See Lomont v. State, 852 N.E. 2d 1002, 1002 (Ind. App. 2006).

110 State v. Harner, 103 P.3d 738, 738 (Wash. 2004); Lomont v. State, 852 N.E.2d 1002, 1005-09 (Ind. Ct. App. 2006).

111 *Id.* at 743. *See also* State v. Little, 66 P.3d 1099, 1099 (Wash. Ct. App. 2003).

112 People v. Forkey, 72 A.D.3d 1209, 1209 (N.Y. App. Div. 2010) (holding that the defendant is not entitled to hearing before being rejected for drug court); State v. Saxon, No. A-1964-08T4, 2010 N.J. Super. Unpub. LEXIS 613, (N.J. Mar. 23, 2010) (holding that the defendant is not entitled to enter the drug court program); Phillips v. State, 25 So. 3d 404, 404 (Miss. Ct. App. 2010).

113 Evans v. State, 667 S.E.2d 183, 183 (Ga. Ct. App. 2008).

114 Jim v. State, 911 So. 2d 658, 658 (Miss. Ct. App. 2005); C.D.C. v. State, 821 So. 2d 1021, 1025 (Ala. Crim. App. 2001) (analyzing the issue under due process clause, with same result).

115 Lomont v. State, 852 N.E.2d 1002, 1002 (Ind. Ct. App. 2006) (holding that the lack of a drug diversion program in the relevant county does not treat the defendant unfairly or unequally, as compared to other defendants, because all defendants in that county do not have access to a drug diversion program).

116 *In re* Miguel, 63 P.3d 1065, 1074 (Ariz. Ct. App. 2003).

117 People v. Cisneros, 100 Cal. Rptr. 2d 784, 784 (Cal. Ct. App. 2000) (holding that an illegal alien status is not automatic disqualification for drug court); People v. Espinoza, 132 Cal. Rptr. 2d 670 (Cal. Ct. App. 2003) (holding that an illegal alien status is proper consideration for denial of Prop. 36 referral to treatment). *See generally* Yemson v. United States, 764 A.2d 816, 819 (D.C. Cir. 2001) (affirming because appellant failed to show that his nationality and his immigration status served as the basis for the sentence he received, rather than his unlawful conduct).

118 U.S. CONST. amend. VI.

119 Argersinger v, Hamlin, 407 U.S. 25, 40 (1972).

120 Brewer v. Williams, 430 U.S. 387, 401 (1977).

121 Gagnon v. Scarpelli, 441 U.S. 778, 787 (1973).

122 State v. Kouba, 709 N.W.2d 299, 299 (Minn. Ct. App. 2006); State v. Sommer, 878 P.2d 1007, 1008 (N.M. Ct. App. 1994). *But see* DeMillard v. State, 190 P.3d 128, 128 (Wyo. 2008).

123 Faretta v. California, 422 U.S. 806, 822 (1975). *But see* Indiana v. Edwards, 128 S.Ct. 2379, 2379 (2008) (holding that a court may deny a person the right to self-representation due to mental illness, even when the court finds that the person is competent to stand trial).

124 Iowa v. Tovar, 541 U.S. 77, 92 (2004).

125 Mempa v. Rhay, 389 U.S. 128, 128 (1967); State v. Thomas, 659 N.W.2d 217, 217 (Iowa 2003). *See also* Dunson v. Kentucky, 57 S.W.3d 847, 847 (Ky. Ct. App. 2001) (concluding that defendant's assertions that he was denied counsel were unfounded because he was never without counsel at any critical stage of the proceedings).

126 U.S. CONST. amend. V.

127 United States v. DiFrancesco, 449 U.S. 117, 129 (1980).

128 Witte v. United States, 515 U.S. 398, 405 (1995); People v. Lopez, 97 P.3d 223, 223 (Colo. Ct. App. 2004), *aff'd on other grounds,* 113 P.3d 713 (Colo. 2005) (holding that sentencing for deferred judgment violations, including positive urine tests, does not violate double jeopardy). *See also* Doyle v. State, 302 S.W.3d 607, 607 (Ark. App. Feb.18, 2009).

129 One Car v. State, 122 S.W.3d 422, 422 (Tex. App. 2003); State v. Griffin, 109 P.3d 870, 870 (Wash. Ct. App. 2005).

130 United States. v. McInnis, 429 F.3d 1, 5 (1st Cir. 2005) (holding that double jeopardy does not apply to the revocation of supervised release because it is considered part of the original sentence); United States v. Carlton, 442 F.3d 802, 809 (2d Cir 2006).

131 *In re* O.F. *773 N.W.2d 206, 206* (N.D. 2009).

132 C.H. v. State, 850 So.2d 675, 675 (Fla. 2003).

133 Breed v. Jones, 421 U.S. 519, 529 (1975).

134 *In re* Nolan, 203 P.3d 454, 454 (Cal. 2009). In this case the NADCP filed an Amicus Brandeis Brief in support of using short jail sanctions to motivate behavior change. *Id.*

135 *Id.*

136 Brown v. State, 971 A.2d 932, 932 (Md. 2009).